91-1212

(1)

No. _____

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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PORTER H. MITCHELL,

*Petitioner,*

v.

MOBIL OIL CORPORATION, et al.,
a New York Corporation,

*Respondents.*

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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January 27, 1992

## QUESTION PRESENTED

When a verdict loser elects not to file a Fed.R.Civ.P. 50(b) motion for judgment n.o.v. and the verdict is set aside by the court of appeals due to a gap in the evidence, are the appellate and trial courts without power to order the appellant any relief other than a retrial and is this so notwithstanding the law of the case doctrine?

## LIST OF PARTIES

Petitioner (Plaintiff-Appellant):

Porter H. Mitchell

Respondents (Defendants-Appellees):

Mobil Oil Corporation, a New York corporation

Retirement Plan of Mobil Oil Corporation

Trustees of the Retirement Plan of Mobil Oil Corporation

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COMES NOW your Petitioner, Porter H. Mitchell, and hereby respectfully prays this Honorable Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on September 18, 1991.

## OPINION BELOW

The unreported opinion of the court of appeals appears in the Appendix at **A-1** through **A-4**. The district court's unreported findings construing the Tenth Circuit's mandate as requiring dismissal of petitioner's ADEA claims appear at **A-15** to **A-18** and the judgment thereon at **A-19** to **A-20**.

## JURISDICTION

The judgment of the court of appeals was entered on September 18, 1991, and a petition for rehearing en banc was denied on October 29, 1991. **A-5** to **A-6**. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CIVIL RULE AND STATUTE INVOLVED

A. **Fed.R.Civ.P. 50 (1987).**[1] *See* Appendix H.

B. **28 U.S.C. § 2106.** *See* Appendix H.

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[1] The version of Rule 50 here at issue is the one which became effective on August 1, 1987. It must be noted, however, that no amendment to the rule since *Cone v. West Va. Pulp & Paper Co.*, 330 U.S. 212 (1947) was announced, including the most recent 1991 changes, has in any way affected the scope of appellate court review. The issue presented in this petition persists with the same importance it had when *Cone* was decided.

## STATEMENT OF THE CASE

**A. Nature of the Case.**[2] In March 1986, Mitchell filed suit in the district of Colorado against Mobil Oil Corporation, his former employer of 31 years. He claimed that Mobil willfully violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ["ADEA"], and the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 ["ERISA"], by manipulating the terms of its retirement plan to induce his constructive discharge by involuntary early retirement. The district court had jurisdiction under 28 U.S.C. § 1331.

In December 1988, Mitchell tried his ADEA claims to a seven-person jury and his ERISA claims to the court. After a five-day trial, the jury unanimously found that Mobil had willfully violated the ADEA and awarded back pay, front pay, and an early retirement penalty. Based on the jury's finding of willfulness, the court doubled the back pay award as liquidated damages. Sitting as a fact finder, the trial court concluded that Mobil had also violated ERISA and awarded monetary relief in the amount of damages awarded by the jury.

Although Mobil had moved for a directed verdict during trial, it chose not to file a post-verdict motion for judgment n.o.v. and lodged an immediate notice of appeal in January 1989 as to both the ADEA and ERISA judgments.

In a February 16, 1990 opinion, the court of appeals reversed the ERISA judgment on a point of law, holding that separated employees (even those whose termination is involuntary) have no standing to prosecute ERISA violations. *Mitchell*, 896 F.2d at 474. As to the ADEA judgment, Mitchell prevailed on each and every specification of legal error

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[2] For a more detailed recitation of the case, see the prior related appeal. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir.), *cert. denied*, 111 S. Ct. 252 (1990).

stated by Mobil. 896 F.2d at 467-71. Yet the court of appeals still reversed, finding that Mitchell had not met his burden of production on the issue of pretext. The reversal rested solely on a perceived gap in the supporting evidence, not on any error of law. 896 F.2d at 471-73.

Although the opinion simply reversed, Mitchell's counsel at first mistakenly assumed that it called for dismissal of all claims. In a request for additional time to file a petition for rehearing, Mitchell's counsel stated that the opinion called for "total dismissal of plaintiff's claims, not merely remand for retrial . . . " In fact, however, the opinion was silent as to what remedy Mobil was entitled on remand and merely stated, "we REVERSE the judgments of the district court." 896 F.2d at 474. Nor did the court's judgment offer any guidance; it merely remanded "for further proceedings in accordance with the opinion of this Court." **A-8**.

After denial of rehearing, Mitchell moved to clarify, or alternatively, to amend the judgment to expressly order a new trial. **A-9** to **A-13**. Mitchell pointed out that Mobil's failure to file a motion j.n.o.v. precluded the court from ordering Mobil any relief as to the ADEA claims other than a retrial. Mitchell then requested from this Court an extension of time to file his petition for writ of certiorari, advising that if the Tenth Circuit determined that the ADEA claims were not subject to retrial, despite Mobil's failure to file a motion for judgment n.o.v., then he intended to present an issue to this Court relating to such determination. The result of Mitchell's motion, however, shed no light on the issue, dispatched as it was in one word: "denied." **A-14**.

Having refused to clarify or amend, the court of appeals made no determination as to whether Mitchell was entitled to a new trial on remand. Because Mitchell's entitlement to a new trial had not been denied, the issue never became ripe for

presentation in this Court in the prior proceeding, a fact brought to this Court's attention.[3]

**B. Trial Court Disposition After Remand.** The mandate which issued following this Court's October 1990 denial of certiorari merely incorporated the opinion and judgment and thus still did not specify what relief Mobil was to receive on remand. Mitchell then moved the trial court to implement the mandate in accordance with long-standing precedent of this Court by ordering a retrial of the ADEA claims. While finding that it would "definitely permit a new trial" if the Tenth Circuit's mandate would allow (**A-16**), the trial judge felt she did not have that option. **A-16**. Reading *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, *reh'g denied*, 386 U.S. 1027 (1967), as modifying the absolute prohibition of *Cone*, as reiterated in *Johnson v. New York, N.H. & Htfd. Rd. Co.*, 344 U.S. 48 (1952), the trial court (although "troubled" by *Johnson*), felt constrained to dismiss the case, **A-16** to **A-18**, and entered judgment accordingly. **A-19** to **A-20**.

**C. Mitchell's 1991 Appeal.** A second court of appeals panel concluded that the trial court had correctly construed the first panel's mandate as demanding dismissal of the ADEA claims. The decision of the first panel that the trial court should have granted Mobil's motion for a directed verdict became, in the opinion of the second panel, the "law of the case" when the mandate issued. Therefore, Mobil's failure to file a motion for j.n.o.v. was merely "superfluous." **A-3**. The court went on to say (incorrectly) that Mitchell raised the

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[3] As stated in footnote 1 in Mitchell's 1990 Petition: "Petitioner requested an extension in hope that the court of appeals would decide whether Mitchell was entitled to a new trial on remand. The court refused to rule on the question, leaving it for trial court resolution." In his Reply Brief [at 2], Petitioner reiterated this position: "In denying the Motion for Clarification without explanation, the Tenth Circuit did not refuse to order a new trial but simply refused to specify the contents of its mandate in advance. The issue is thus not ripe for consideration by this Court."

issue now being asserted in his petition for rehearing, and denial of that request also became the law of the case. **A-3.**

The court then relied on 28 U.S.C. § 2106 as authorizing direction of the entry of an "appropriate judgment." While the court recognized the holding in *Cone* that "a court of appeals should not direct judgment for a verdict loser who had not moved for judgment notwithstanding the verdict," it cited *Neely* as "contrary authority." **A-3.** The court then stated, however, that it need not decide the jurisdictional issue posed by *Cone* and *Neely* because "the decision in the first appeal became the law of the case" which the second panel was "not entitled to change." **A-3.** The court rejected Mitchell's arguments that the mandate allowed a new trial and that the court of appeals was without power to deny him one as "without merit." **A-4.**

## REASONS COMPELLING REVIEW

This case presents a straightforward and pure question of federal law concerning the power of appellate courts to fashion relief for a successful appellant who chose not to comply with post-verdict procedural requirements after loss of a jury trial. A long and unbroken line of authority of this Court beginning with *Cone* in 1947 and continuing through *Neely* in 1967 categorically holds that a verdict loser who does not comply with the procedural requirements of Rule 50(b) by filing a motion for judgment n.o.v. has no right to relief other than a retrial if the judgment is reversed due to the appellate court's finding of a gap in the evidence offered in support of the verdict. This rule is mandatory, jurisdictional, and absolute, and as such, it may not be waived, nor may it be avoided by application of the law of the case doctrine.

Although the panel below couches its decision in "law of the case" terms and denies any decision in this case on the issue of whether *Neely* abrogated *Cone's* strict limitation of the power of appellate courts, the court of appeals did,

indeed, decide this precise issue when it approved the trial court's entry of judgment in favor of Mobil (which filed no motion for judgment n.o.v.) in clear disregard of the Cone rule.

The issue presented is purely legal: whether Mobil waived and irretrievably lost the right to any relief on reversal for insufficiency of evidence other than a retrial when it elected not to file a motion for judgment n.o.v. The sufficiency of the record in the first trial is not at issue here. Nor is this case about whether Mitchell waived any rights—he was and remains entitled to a retrial due to Mobil's failure to preserve its position. Once Mobil limited the scope of its available relief by its chosen strategy, nothing Mitchell did or did not do could cause Mobil's foregone rights to spring back into existence.

This case presents the Court with a unique opportunity to clarify and stabilize the principle established by the *Cone/Globe/Johnson* trilogy of decisions and reaffirmed in *Neely*. The question is one of jurisdiction and power governed by clear decisions of this Court and not one, as Mobil will doubtlessly argue, subject to waiver, nor one, as the Tenth Circuit has held, involving an issue subject to the "law of the case" doctrine.

The need to clarify is compelling. On the one hand, if the Tenth Circuit is incorrect, its opinion conflicts with plain and unequivocal holdings of this Court and creates confusion and lack of uniformity of decision among the circuits as to this important procedural issue. On the other hand, if the Tenth Circuit's reading of *Neely* as allowing entry of judgment without the requirement of a motion for judgment n.o.v. is correct, then virtually every circuit in the federal system is functioning under self-imposed unnecessary restraints on their power. If *Neely* stripped the *Cone* rule of its mandatory and jurisdictional nature, that expansion of appellate power to fashion relief has been lost on virtually every circuit in the federal system because no intermediate court (until this case)

has interpreted *Neely* as undercutting the strictures of *Cone*. *See* fn. 4, *infra*.

This matter deserves the attention of this Court's scarce resources to insure observance of this Court's decisions, clarify the scope of federal appellate power, preserve the uniformity of decisions among the circuits, and examine an unfair departure from the accepted and usual course of judicial proceedings by the court below capable of repetition in other cases.

## I. CONE UNMISTAKABLY PRESCRIBES THAT WHEN A VERDICT LOSER ELECTS NOT TO FILE A MOTION FOR J.N.O.V. AND WINS REVERSAL ON APPEAL DUE TO A GAP IN THE EVIDENCE, THE APPELLATE AND TRIAL COURTS ARE WITHOUT POWER TO ORDER ANY REMEDY OTHER THAN A RETRIAL.

This petition presents a pure question of law for this Court's consideration. Mobil never filed a motion for judgment n.o.v. after judgment entered on Mitchell's ADEA verdict. The Tenth Circuit has allowed judgment to enter in favor of Mobil despite this failure. This proceeding requires no other factual predicate.

An unbroken line of authority from this Court, commencing with *Cone*, unequivocally provides that appellate and trial courts are precluded from directing entry of judgment in favor of a verdict loser who did not file a Rule 50(b) motion for j.n.o.v.; only a retrial may be granted. *Cone*, 330 U.S. at 852.

*Cone* reversed a Fourth Circuit ruling which directed a verdict in favor of a verdict loser who did not move for judgment n.o.v. The certiorari petition challenged the power of the appellate court to direct entry of what was, in effect, a judgment n.o.v. when the verdict loser made no such request in the trial court. After observing that the judge who "saw and

heard the witnesses" and had "the feel of the case which no appellate printed transcript can impart" should be given a final chance to correct its errors (including a refusal to direct a verdict), 330 U.S. at 216, this Court in *Cone* held:

> In the absence of such a motion [for judgment n.o.v.], we think the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.

*Cone*, 330 U.S. at 218 (emphasis added).

One year later, this Court again held that upon reversal the circuit court was without power to enter judgment for a verdict loser who did not make a j.n.o.v. motion. It could only order a new trial:

> In the *Cone* case we held that the Circuit Court of Appeals was without power to order the entry of final judgment for the loser of a jury verdict in the District Court where he had failed to follow his motion for directed verdict with a timely motion for judgment as required by Rule 50(b).

*Globe Liquor Co. v. San Roman*, 332 U.S. 571, 572-73, *reh'g denied*, 333 U.S. 830 (1948) (emphasis added). When no motion for judgment n.o.v. is filed, "[t]he case should go back to the District Court for a new trial." *Globe*, 332 U.S. at 574.

Five years later, *Johnson* held that Rule 50(b) motions are not "idle" motions and reiterated the holdings of *Cone* and *Globe*:

> We have said that in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict the rule forbids the trial judge or an appellate court to enter such a judgment.

*Johnson*, 344 U.S. at 50 (emphasis added). Citing its prior refusal to adopt a requested "amendment to the rule which would have given appellate courts power to enter judgment

for parties who had made no timely motion for judgment notwithstanding the verdict," this Court stated:

> We did not adopt the amendment then. No sufficiently persuasive reasons are presented why we should do so now under the guise of interpretation.

*Johnson*, 344 U.S. at 53-54 (citation omitted). When a party fails to file a Rule 50(b) motion for judgment n.o.v. after a verdict, the "respondent is entitled only to a new trial, not to a judgment in its favor." *Id.* (emphasis added).

The *Cone/Globe/Johnson* triology unmistakably provides that a court of appeals which reverses due to an evidentiary deficiency is without power to direct entry of judgment for a verdict loser who filed no j.n.o.v. motion.

As stated by Professor Moore, the "failure to move for judgment n.o.v. can have dire consequences in terms of the scope of review available on appeal." 5A James W. Moore & Jo Desha Lucas, *Moore's Federal Practice*, ¶50.12 at 50-90 (2d ed. 1991). "[I]n this situation the appellate court may not direct the entry of judgment n.o.v. for the appellant; the only relief the appellant may obtain is an order for a new trial." *Id.* at 50-91 (emphasis added).

## II. NEELY DID NOT ALTER BUT REAFFIRMED THE RULE OF CONE.

*Neely* did not constrict or change in any manner the rule established by the *Cone/Globe/Johnson* triology. Rather, *Neely* reaffirmed this line of cases, stating that the three cases "make it clear that an appellate court may not order judgment n.o.v. where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b) . . . " *Neely*, 386 U.S. at 325. *Neely* does not, as the court of appeals stated here, extend authority to an appellate court to enter judgment on behalf of an appellant who failed to make a Rule 50(b) motion in the trial court. *Neely* deals only with an appellate court's power where a j.n.o.v. motion has been timely filed—a critical distinction from both *Cone* and from

petitioner's case here. Nowhere does *Neely* confer any power to depart from the *Cone* rule as stated in the Tenth Circuit opinion (a result it not only alludes to but which it undeniably reached through its treatment of its first opinion).

Since *Neely* was announced some 24 years ago, virtually every circuit (including the Tenth Circuit until the decision below) has uniformly construed *Cone's* restrictions on the power of appellate and trial courts to be unaffected by *Neely*.[4]

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[4] The following single citations from the various circuits simply illustrate their continued adherence to the *Cone* rule even after *Neely* was decided. They are by no means exhaustive. *See, e.g.*, **FIRST CIRCUIT:** *Pinkham v. Burgess*, 933 F.2d 1066, 1070 (1st Cir. 1991) (appellant not entitled to an outright reversal of the judgment because he failed to move for j.n.o.v.); **SECOND CIRCUIT:** *Borger v. Yamaha Int'l Corp.*, 625 F.2d 390, 395 (2d Cir. 1980) (a j.n.o.v. not a "useless formality," and absent such a motion, appellate court is without power to enter judgment contrary to the trial court); **THIRD CIRCUIT:** *Charles Jacquin Et Cie v. Destileria Serralles*, 921 F.2d 467, 475 (3d Cir. 1990) ("Where a party has failed to move for j.n.o.v., we will not review the sufficiency of the evidence . . . "); **FOURTH CIRCUIT:** *Morrash v. Strobel*, 842 F.2d 64, 70 (4th Cir. 1987) (failure to file j.n.o.v. is a "crucial omission" which prevents appellate court from entering a judgment contrary to the judgment below and constrains the court to remand the cause for a new trial); **FIFTH CIRCUIT:** *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 548 (5th Cir. 1974) ("a court of appeals cannot order entry of judgment for a party whose motion for a directed verdict was erroneously denied unless the sufficiency of the evidence is first tested by a motion for judgment n.o.v."); **SIXTH CIRCUIT:** *Howard v. Kerr Glass Mfg. Co.*, 699 F.2d 330, 332 (6th Cir. 1983) (appellate court "precluded" from ordering district court to enter a directed verdict); **SEVENTH CIRCUIT:** *Continental Cas. Co. v. Howard*, 775 F.2d 876, 883 fn.2 (7th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986) (appellate court would have directed a verdict in favor of party had party filed a timely j.n.o.v. as prescribed by Rule 50(b)); **EIGHTH CIRCUIT:** *Total Petroleum, Inc. v. Davis*, 788 F.2d 476, 479 (8th Cir. 1986) (only relief to be obtained is the ordering of a new trial); **TENTH CIRCUIT:** *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1334 (10th Cir. 1984) (citing both *Globe* and *Neely* to support rule that a new trial is the only relief available where no j.n.o.v. motion filed); **ELEVENTH CIRCUIT:** *Norton v.*

*(footnote continues)*

In fact, research has revealed not a single case in which a verdict loser who made no post-verdict motion for j.n.o.v. was granted any remedy other than retrial after his appeal resulted in reversal due to evidentiary insufficiency.

Commentators agree that *Neely* did not relax the strict rule of *Cone*. The two cases derive from substantively separate origins: *Neely* involved a motion for judgment n.o.v. while *Cone* did not. Professor Moore, for example, treats *Cone/Globe/Johnson* and *Neely* as entirely separate concepts, never discussing them in the same section of his treatise. *See*, 5A *Moore's Federal Practice*, ¶ 50.12 at 50-86, "Power of Appellate Court Where Appellant Failed to Move for Judgment N.O.V. Under Rule 50(b)" (discussing *Cone*, exclusively), and *compare*, ¶ 50.15 at 50-108, "Appellate Review and Disposition of Cases Involving Motions Under Rule 50(b) Where Judgment N.O.V. Is Denied by Trial Court" (discussing *Neely*, exclusively).

## III. THE CONE RULE IS MANDATORY AND JURISDICTIONAL, NOT SUBJECT TO WAIVER, AND MAY BE RAISED AT ANY STAGE OF THE PROCEEDINGS.

Given the jurisdictional nature of the bar to the relief sought by Mobil, a waiver by Mitchell was and is a legal impossibility. Mitchell did not waive and could not have waived his right to challenge the appellate court's jurisdiction to direct the entry of a judgment of dismissal, nor his right to

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*(footnote continued)*

*Snapper Power Equip. Div. of Fuqua*, 806 F.2d 1545, 1547 (11th Cir.) *reh'g denied*, 812 F.2d 1415 (1987) (appellate court without power to enter j.n.o.v. absent timely motion by losing party after trial); *D.C. CIRCUIT: Harbor Ins. Co. v. Schnabel Foundation Co., Inc.*, 946 F.2d 930, 936 (D.C. Cir. 1991) (where a party has failed to move for j.n.o.v., an appellate court may not reverse and enter judgment; relief is limited to ordering a new trial); *FEDERAL CIRCUIT: Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 854 (Fed. Cir. 1991) (the only available remedy where no j.n.o.v. motion is filed is a remand for a new trial).

convince the trial court to implement the mandate in accordance with controlling precedent of this Court.

Under *Cone* and its progeny, neither the Tenth Circuit nor the district court had the power or jurisdiction to enter any mandate or order which precluded a new trial for Mitchell. As *Cone* held, "the appellate court was without power to direct the District Court to enter judgment." *Cone, 330* U.S. at 218. The rule enunciated in *Cone*, can only be viewed as one of jurisdiction, and jurisdictional issues cannot be waived. *Compare, Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988) and cases cited therein. Courts "must obey the mandatory provisions of the [federal] rules whether they are referred to as mandatory, jurisdictional or mandatory and jurisdictional." *Mann v. Lynaugh*, 840 F.2d 1194, 1197 (5th Cir. 1988). The rule at issue here implicates the jurisdiction of the court. *Compare, Kain v. Winslow Mfg., Inc.*, 736 F.2d 606, 609 (10th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985) (where party did not move for new trial, the district court was "powerless to order a new trial, and its order exceeded its authority and jurisdiction").

Mitchell does not maintain that the Federal Rules of Civil Procedure create jurisdiction.[5] The question at issue obviously arises from the jurisdiction granted by statute, 28 U.S.C. § 2106, but that jurisdiction is exercised or expressed by practice in the federal courts which is necessarily governed by the rules of procedure, which in and of themselves are mandatory and jurisdictional. This is the rule enunciated in *Cone* and confirmed unaltered in *Neely*.

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[5] It is axiomatic that no act of a party can confer or withdraw subject matter jurisdiction on a federal court. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). However, the effect of Mobil's failure to move for j.n.o.v. is an entirely distinct jurisdictional issue. Nothing from the law of subject matter jurisdiction relieved Mobil of its procedural requirement under Rule 50(b); nor is the appellate court's scope of power enunciated in *Cone* in conflict with principles of subject matter jurisdiction.

Finally, the true issue in this case is really not one involving the waiver of any rights by Mitchell—to a new trial or otherwise. The issue from which this Court's attention must not be diverted is whether Mobil irretrievably waived or surrendered its right to any remedy other than a retrial when it elected in January 1989 not to file post-trial motions. In effect, the court of appeals has ruled that Mitchell's failure to bring to its attention the issue of limitations on its power to afford relief sooner somehow "waived Mobil's waiver," or in other words, served as the legal equivalent of a Rule 50(b) filing by Mobil in January 1989! Surely, this cannot be the law.

As it has turned out thus far, it has been only Mitchell, not Mobil (nor the court of appeals), who was prejudiced by Mobil's election not to make a Rule 50(b) motion. Mitchell was deprived of the right to move for a new trial or nonsuit because of Mobil's decision not to point out the alleged deficiencies of his evidence at the appropriate procedural time. To hold that Mobil's rights actually increased in scope because it did not follow the rules makes a mockery of the rules of procedure.

## IV. NEITHER THE LAW OF THE CASE DOCTRINE NOR ANY OTHER DOCTRINE, RULE OR PRACTICE CAN SERVE TO OBVIATE THE SUPREME COURT PRECEDENTS THAT GOVERN HERE.

In its mechanical application of the law of the case doctrine, the court of appeals holds, in effect, that even if it or the district court erroneously applied Supreme Court precedent, that error no longer can be corrected. Such is not the law.

First, it must be remembered that the court's opinion and judgment merely reversed and remanded and did not prescribe the relief to be afforded Mobil. The "law of the

case" doctrine cannot be applied under these circumstances so as to foreclose a retrial:

> In a case in which the mandate of the appellate court does not address a particular issue, the appellate judgment, on this issue, does not establish the law of the case, and on appeal from the judgment rendered after remand, it may be reviewed by the appellate court.

1B *Moore's Federal Practice*, ¶ 0.404[4.-3] at 131.

Second, the doctrine is not an inflexible restraint on judicial power. "[T]he law-of-the-case doctrine 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.' *Christianson v. Colt Industries*, 486 U.S. 800, 817 (1988) (citations omitted) (emphasis added).

Third, as this Court has itself recognized "[m]ost importantly, law of the case cannot bind this Court in reviewing decisions below." *Id.* Even if the doctrine bound the courts below in this matter (which it did not), it does not constrain this Court at all.

Fourth, the court of appeals has employed the law of the case doctrine as something which gives courts the power or authority to ignore Supreme Court precedent and supplant law which governs jurisdictional issues. As the court held in *Fogel v. Chestnutt*, 668 F.2d 100 (2d Cir. 1981), *cert. denied*, 459 U.S. 828, *reh'g denied*, 459 U.S. 1059 (1982):

> [I]f . . . a decision of the Supreme Court demonstrates that a ruling on which the judgment would depend was in error, no principle of law of the case would warrant a failure on our part to correct the ruling.

*Fogel*, 668 F.2d at 109 (citations omitted).

Fifth, the law of the case doctrine does not entail the extent of finality which the court below has given it:

> It is important to note that the law of the case doctrine does not limit this court's power to reconsider earlier rulings in the case. The doctrine is a self-imposed prudential limitation rather than a recognition of limitation of the court's power.

*Evans v. City of Chicago*, 873 F.2d 1007, 1014 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 2560 (1990) (emphasis added) (citations omitted). The Tenth Circuit has previously recognized the same rule in *United States v. Carson*, 793 F.2d 1141, 1147 (10th Cir.), *cert. denied*, 479 U.S. 914 (1986): The "law of the case is not a jurisdictional rule; rather it is a rule to be applied at the sound discretion of the court to effectuate the proper administration of justice. . . ." *See also Southern Ry. Co. v. Clift*, 260 U.S. 316, 319 (1922).

For the foregoing reasons, there can be no law of the case or related preclusion doctrine that prevented the second court of appeals panel in this matter from correcting the errors of the district court in construing the appellate court's mandate or in determining the limits to its own jurisdiction, or the appellate court's own error if the first panel did direct the district court to enter judgment contrary to governing precedent of this Court.

## CONCLUSION

For the reasons above stated, this petition should be granted to review the decision below to conform with established precedent of this Court, clarify the scope of the court of appeals' power after *Neely*, avoid decisional confusion among the circuits, determine whether the "law of the case" doctrine can serve to remove limits on an appellate court's powers,

and rectify an egregious departure from the accepted and usual course of judicial proceedings.

Respectfully submitted,
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*Counsel for Petitioner*
*Porter H. Mitchell*

DATED this 27th day of January 1992.

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PORTER H. MITCHELL,
*Plaintiff-Appellant,*

v.

MOBIL OIL CORPORATION, A New York corporation; RETIREMENT PLAN OF MOBIL OIL CORPORATION; TRUSTEES OF THE RETIREMENT PLAN OF MOBIL OIL CORPORATION,
*Defendants-Appellees.*

No. 91-1084
(D. C. No. 86-Z-585)
(D. Colo.)

**ORDER AND JUDGMENT***
[Filed September 18, 1991]

Before ANDERSON, TACHA, and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Mr. Mitchell appeals the entry of a judgment based upon the mandate of this court. We affirm.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Mr. Mitchell sued Mobil asserting age discrimination. A jury agreed and awarded Mr. Mitchell damages. Mobil appealed to this court and we reversed, holding that Mr. Mitchell's evidence was insufficient. We then remanded "for further proceedings in accordance with the opinion of this court."

Mr. Mitchell requested and received an extension of time to file a petition for rehearing with an en banc suggestion. In his request Mr. Mitchell recognized that this court's decision "calls for total dismissal of plaintiff's claims, not merely remand for new trial." In his petition for rehearing he represented to this court that we had reversed the judgments and ordered dismissal. He also claimed that he could present additional evidence at a retrial. We denied rehearing and granted Mr. Mitchell a stay while he petitioned for certiorari. Mr. Mitchell then filed a motion with this court to clarify its opinion and to declare he should have a new trial on remand. He stated if we deny this relief "Mitchell desires to challenge this ruling" in the petition for certiorari. Certiorari was denied, as was the relief requested from this Court.

Upon remand, Mr. Mitchell asserted he was entitled to a new trial. The basis of this assertion was the fact that Mobil had failed to move for judgment notwithstanding the verdict.[1] As in his petition for rehearing, on remand Mitchell pointed to additional evidence he could offer in a second trial. Mitchell did not claim that the additional evidence was newly discovered. However, Mr. Mitchell argued he could reasonably be expected to discover new evidence.

The district court denied Mr. Mitchell's request for a new trial stating that the circuit court had not given the trial court that option. Mr. Mitchell appeals this decision asserting: (1) the district court misconstrued the mandate of this

---

[1] Mobil had moved for a directed verdict at the close of Mr. Mitchell's case. At the close of all evidence, Mobil again moved for a directed verdict.

court; and (2) the district court erred in holding that this court and the district court possessed the power to afford Mobil any remedy other than retrial.

We begin our inquiry with an examination of this court's holding on appeal. There we said:

> Since Mr. Mitchell did not meet his burden of production on the issue of pretext . . . we reverse the trial court's denial of Mobil's motion for a directed verdict . . . .

*Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 473 (10th Cir.), *cert. denied*, 111 S. Ct. 252 (1990).

This holding became the law of this case when the mandate was issued. The holding was simple—the trial court should have granted Mobil's motion for a directed verdict. Mr. Mitchell's claim regarding Mobil's failure to request judgment notwithstanding the verdict is therefore superfluous. Mr. Mitchell raised the claims he is now asserting in his petition for rehearing. We have denied relief on those claims, the law of the case controls.

28 U.S.C. § 2106 specifically authorizes courts of appeals to "direct the entry of . . . appropriate judgment." This we did in the first appeal. Mr. Mitchell argues that a court of appeals should not direct judgment for a verdict loser who had not moved for judgment notwithstanding the verdict. Authority exists to support this argument. See *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947). Contrary authority also exists. See *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 325-26 (1967) (holding no ironclad rule exists dictating that the court of appeals should never order judgment for a defendant when the plaintiff's verdict has been set aside on appeal.) However, we need not decide this issue. Our decision in the first appeal became the law of the case. This panel is not entitled to change the decision of this court as enunciated by the first panel.

The judgment of the district court is AFFIRMED. Mr. Mitchell's arguments that the mandate of this court allows him a new trial are without merit, as are his arguments that this court lacked the power to deny him a new trial.

Entered for the Court:

/s/

WADE BRORBY
*Circuit Judge*

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PORTER H. MITCHELL,
*Plaintiff-Appellant,*

v.

MOBIL OIL CORPORATION, A New York corporation; RETIREMENT PLAN OF MOBIL OIL CORPORATION; TRUSTEES OF THE RETIREMENT PLAN OF MOBIL OIL CORPORATION,
*Defendants-Appellees.*

No. 91-1084

**ORDER**
Filed October 29, 1991

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be

polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER,
Clerk

/s/

By: _____
Patrick Fisher
*Chief Deputy Clerk*

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

| | |
|---|---|
| PORTER H. MITCHELL,<br>*Plaintiff-Appellee/ Cross-Appellant,*<br>v.<br>MOBIL OIL CORPORATION, A New York corporation; RETIREMENT PLAN OF MOBIL OIL CORPORATION; TRUSTEES OF THE RETIREMENT PLAN OF MOBIL OIL CORPORATION,<br>*Defendants-Appellees/ Cross-Appellees.* | Nos. 89-1019<br>89-1031<br>89-1085<br>89-1111 |
| ERISA INDUSTRY COMMITTEE and ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS,<br>*Amici Curiae.* | |

**JUDGMENT**
Entered February 16, 1990

Before MOORE and ANDERSON, Circuit Judges, and DAUGHERTY, District Judge.*

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remanded to

the United States District Court for the District of Colorado for further proceedings in accordance with the opinion of this court.

Entered for the Court

ROBERT L. HOECKER,
Clerk

/s/

By: _____
Patrick Fisher
*Chief Deputy Clerk*

*The Honorable Frederick A. Daugherty, Senior District Court Judge for the Western District of Oklahoma, sitting by designation.

## APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
Case Nos. 89-1019, 89-1031, 89-1085, and 89-1111

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PORTER H. MITCHELL,
*Plaintiff-Appellee/*
*Cross-Appellant,*

v.

MOBIL OIL CORPORATION,
*Defendants-Appellant/*
*Cross-Appellee.*

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**MITCHELL'S MOTION FOR CLARIFICATION OF THE FEBRUARY 16, 1990 OPINION AND JUDGMENT, AND ALTERNATIVELY, MOTION TO AMEND JUDGMENT AND MANDATE TO EXPRESSLY ORDER A NEW TRIAL**

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COMES NOW the plaintiff-appellee Porter H. Mitchell, pursuant to F.R.A.P. 27(a) and governing precedent, and hereby requests this Honorable Court to clarify its opinion and judgment to expressly declare that upon remand, Mitchell is to be afforded a new trial on his ADEA claim, or if such is not the intent of the Court, then in the alternative, based upon the authority discussed below, to modify the opinion, judgment, and future mandate to expressly direct the district court to afford Mitchell such a retrial upon remand, and **AS GROUNDS THEREFORE,** states the following:

1. On December 13, 1988, the jury returned a verdict in favor of Mitchell on his age discrimination claim finding that Mobil's manipulation of its employee

pension plan constituted a willful violation of the ADEA. Following a hearing on January 4, 1989, the Court entered judgment for Mitchell on both his ADEA and ERISA claims.

2. On January 18, 1989, Mobil filed its notice of appeal without filing a F.R.C.P. 50(b) motion for judgment notwithstanding the verdict as to the ADEA verdict. Docket Sheet (excerpts attached).

3. In the February 16, 1990 opinion of this Court, the panel affirmed the trial court's refusal to grant Mobil a directed verdict at the end of plaintiff's case-in-chief on the ADEA claim, but then overruled the trial court's denial of a directed verdict at the close of the evidence, stating simply: "We REVERSE the judgments of the district court." **Mitchell v. Mobil Oil Corp.,** 896 F.2d 463, 474 (10th Cir. 1990).

4. The judgment which entered on February 16, 1990 merely states:

> Upon consideration whereof, it is ordered that judgment of that court is reversed. The cause is remanded to the United States District Court for the District of Colorado for further proceedings in accordance with the opinion of this Court.

Judgment (attached). Neither the opinion nor the judgment specify as to whether the trial court is directed on remand to order a new trial or to enter judgment for Mobil on the ADEA claim.

5. In light of the stay of mandate through July 16, 1990, no specific mandate has yet issued to the district court; therefore, this Court clearly has jurisdiction over the issue raised herein.

6. Due to absence from the opinion or judgment of an express direction as to whether, upon remand, the district court is to enter judgment in favor of Mobil and

dismiss Mitchell's claims, or on the other hand, to order Mitchell a new trial, a clarification by the Court is necessary.

7. Since the issue is one of subject matter jurisdiction, it can be raised at any time, but insofar as the Court may believe otherwise, Mitchell invokes the Court's general supervisory power and powers under F.R.A.P. 1(b), 2 and 26(b) to relieve a party from the time and content restraints of the Rules such as those, for example, imposed by F.R.C.P. 40 to permit, in the interest of substantial justice, grant of the relief requested.

8. Mitchell intends to file a Petition for Certiorari in the United States Supreme Court by July 16, 1990 or by such later date as may be permitted. If this Court denies the relief requested in this motion, then Mitchell desires to challenge that ruling in the Petition for Certiorari. Mitchell, therefore, requests accelerated determination of this motion.

## ARGUMENT

Since Mobil never filed a Rule 50(b) motion for judgment n.o.v., this Court, after reversing Mitchell's judgments, has no power to order entry of judgment in favor of Mobil upon remand but can only order that a new trial be had. A trilogy of still controlling United States Supreme Court opinions and Court of Appeals opinions, including decisions from this Circuit, so hold.

* * *

## CONCLUSION AND PRAYER

The controlling authority discussed above plainly holds that this Court is without jurisdiction to order entry of judgment in favor of Mobil upon remand on the ADEA claim in

light of Mobil's failure to file a Rule 50(b) motion for judgment n.o.v. with respect to the ADEA verdict. As to that claim, the jurisdictional power of this Court is limited to remand of this cause to the district court with directions to order a new trial.

Due to the lack of specificity in the Court's opinion and judgment entered on February 16, 1990, Mitchell respectfully requests this Court to clarify the intent of those documents by expressly directing that a retrial on the ADEA claim shall be ordered on remand.

Mitchell asks that the above clarification and relief enter as expeditiously as possible to allow adequate time, if necessary, to include in Mitchell's Petition for Certiorari an alternative request for the relief herein sought.

WHEREFORE, plaintiff-appellee Porter H. Mitchell respectfully requests this Honorable Court to clarify its prior opinion and judgment to the effect that remand is with directions to order a new trial on Mitchell's ADEA claim, or in the alternative, if that was not the intention of this Court, to modify and amend the opinion and judgment (and later, fashion the mandate accordingly) to expressly direct the district court to order a retrial of Mitchell's ADEA claim on remand if he is unsuccessful in achieving reinstatement of his judgments via a certiorari proceeding with United States Supreme

Court and to afford Mitchell such other and further relief as the Court deems appropriate under the circumstances.

ATTORNEYS FOR PORTER H. MITCHELL:

/s/

THOMAS L. ROBERTS
RODNEY R. PATULA
PETER H. ZIEMKE
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Submitted: June 21, 1990

## APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

| | |
|---|---|
| PORTER H. MITCHELL,<br>*Plaintiff-Appellee, Cross-Appellant,*<br>v.<br>MOBIL OIL CORPORATION, etc., et al.,<br>*Defendants-Appellants, Cross-Appellee.* | 89-1019<br>89-1031<br>89-1085<br>89-1111 |

**ORDER**
Filed July 5, 1990

Before MOORE and ANDERSON, Circuit Judges.

This matter comes on for consideration of plaintiff's motion to clarify.

Upon consideration whereof, the motion is denied.

Entered for the Court

ROBERT L. HOECKER,
Clerk

/s/

By: _____
Patrick Fisher
*Chief Deputy Clerk*

## APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-Z-585

PORTER H. MITCHELL,

*Plaintiff,*

vs.

MOBIL OIL CORPORATION, *et al.*,

*Defendant.*

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**REPORTER'S TRANSCRIPT**
(Hearing on Motion for New Trial)

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[160] Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 9:50 a.m., on the 7th day of February, 1991, in Courtroom C-502, United States Courthouse, Denver, Colorado.

**APPEARANCES**

PRYOR, CARNEY & JOHNSON, by RODNEY R. PATULA and THOMAS L. ROBERTS, Attorneys at Law, 6200 South Syracuse Way, Suite 400, Englewood, Colorado, 80111, appearing for the plaintiffs.

HADDON, MORGAN & FOREMAN, by HAROLD A. HADDON, Attorney at Law, 150 East Tenth Avenue, Denver, Colorado, 80203; LOREN KIEVE and MARY ANN DOYLE, Attorneys at Law, Debevoise & Plimpton, 875 Third Avenue, New York, New York, 10022, and [161]

MICHAEL E. TIGAR, Attorney at Law, 727 East 26th Street, Austin, Texas, 78705, appearing for the defendants.

Proceedings Recorded by Mechanical Stenography, Transcription Produced via Computer by Paul Zuckerman, 1929 Stout Street, P.O. Box 3563, Denver, Colorado 80294, (303) 629-9285.

* * *

[189]

**RULING**

THE COURT: This court intends to deny the motion for a new trial. And I am going to explain why I am denying the motion for a new trial. But let me indicate that had the Tenth Circuit in the mandate given this court the option of granting a new trial or dismissing the case, this court would definitely permit a new trial.

The plaintiff has represented that there is additional evidence that was not presented or adequately presented and that they would want to present this evidence. The reason the Court is not granting a new trial is because I am convinced that the Tenth Circuit has not given me that option. The wording of the Tenth Circuit has been read already, but we'll review it again—is that paragraph starting with the beginning of the paragraph. It says, "Since Mr. Mitchell did not meet his burden of production on the issue of pretext, the onerous effects of the changes in the plan notwithstanding, we reverse the trial court's denial of Mobil's motion for a directed verdict. Because we hold that Mobil did not violate the ADEA, we need not review Mr. Mitchell's cross-appeal on issues [190] relating to the measure of damages."

I read that language as, in effect, a reversal telling me to enter a judgment of dismissal. Maybe they didn't say that, but that's the clear inference from the Tenth Circuit's language.

The language in the *Neely* case does indicate that there is no ironclad rule and that the Court of Appeals has the authority to order this court to enter a dismissal. In addition, the Tenth Circuit refused to address the issue when there was a motion for clarification and when the Tenth Circuit was specifically asked that the mandate issue allowing a new trial in the case.

I'm troubled by *Johnson*, because *Johnson's* language would seem to indicate, No. 1, that the Tenth Circuit would not have the authority to allow a new trial in this case because there was no j.n.o.v., but perhaps the strong and harsh ruling of the *Johnson* case has really been modified by *Neely*, which says that there is the power.

Commentators such as Wright and Miller certainly have spoken out against what they feel to be an utterly useless new trial, just by finding—I'm sorry—just by following the strong language of the *Johnson* case.

If Mobil had filed a motion for a judgment n.o.v. in this case, there would not be an issue. I would have denied the motion for judgment n.o.v. There would be no procedural [191] defect, and there would be no new trial. It's difficult to see how the plaintiff is really prejudiced because of the fact that plaintiff—that the Mobil did not move for a j.n.o.v.

My opinion is that the Tenth Circuit is telling me to dismiss the case; and my opinion is that they have the authority to tell me that under both *Neely* and 2106, even though I am very bothered by *Johnson*. But I'm going to let the Tenth Circuit wrestle with *Johnson*.

If my denial of a motion for new trial is procedurally incorrect, this matter is going to be taken up to the Tenth Circuit and they can tell me that it is; and I will be very happy to try the case again with new evidence and additional evidence. But I frankly think that that is just not what was ordered in the mandate, even though the—I wish the Tenth Circuit had been precise and had either said to this trial court,

Try it again, or dismiss it, one or the other. They did not, but the inference from their language is clearly there to me. I infer that they're telling me to dismiss the case.

For the reasons that I have stated, the motion for a new trial will be denied. I'll be very anxious to hear what the Tenth Circuit does on appeal with my denial of it. I've tried to make clear the reasons for my denial and incorporate by reference on the record what this court's opinion is. I do not intend to issue a written opinion, but I would ask the attorneys to have the court reporter do a transcript. I have a [192] whole slew of criminal trials coming up, and I'd just as soon let you just take up what I've said and let the Tenth Circuit agree (sic) with that.

Do we have anything else we need to do in this case? Any loose ends? I think not.

I appreciate the argument. It's a very knotty, very difficult issue. It is not an easy issue, and the argument this morning has certainly helped me to clarify my thoughts. Anything further?

MR. PATULA: Nothing further, your Honor.

MR. KEIVE: Thank you very much, your Honor.

THE COURT: Thank you.

(Thereupon, the hearing was concluded and the Court recessed at 10:45 a.m.)

* * *

## APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-Z-585

PORTER H. MITCHELL,

*Plaintiff,*

v.

MOBIL OIL CORPORATION, a New York corporation; RETIREMENT PLAN OF MOBIL OIL CORPORATION; TRUSTEES OF THE RETIREMENT PLAN OF MOBIL OIL CORPORATION;

*Defendants.*

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**ORDER AND JUDGMENT**
[Filed February 28, 1991]

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This matter was before the Court on February 7, 1991, for oral argument on Plaintiff's Motion To Implement Mandate by Ordering New Trial On His ADEA Claims. The Court heard the arguments and statements of counsel and made oral conclusions of law which are incorporated herein by reference as if fully set forth. Accordingly, it is

ORDERED that Plaintiff's Motion To Implement Mandate By Ordering New Trial On His ADEA Claims is denied. It is

FURTHER ORDERED that, pursuant to and in accordance with the Opinion and Judgment of February 16, 1990, of the United States Court of Appeals For the Tenth Circuit in *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir. 1990), judgment is entered in favor of Defendants Mobil Oil Corporation, Retirement Plan of Mobil Oil Corporation, and Trustees of the Retirement Plan of Mobil Corporation and

against Plaintiff Porter H. Mitchell for dismissal, the parties to pay their own costs. It is

DATED at Denver, Colorado, this 28th day of February, 1991.

BY THE COURT:

/s/

ZITA L. WEINSHIENK
United States District Court

## APPENDIX H

**Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.**

**(a) Motion for Directed Verdict: When Made; Effect.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

**(b) Motion for Judgment Notwithstanding the Verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. A party who has moved for a directed verdict may move to have the verdict and any judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. Not later than 10 days after entry of judgment, a motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed, or may order a new trial.

**(c) Same: Conditional Rulings on Grant of Motion.**

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose directed verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

**(d) Same: Denial of Motion for Judgment as a Matter of Law.** If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(As amended Jan. 21, 1963, Eff. July 1, 1963; Mar. 2, 1987, Eff. Aug. 1, 1987; Apr. 30, 1991, Eff. Dec. 1, 1991.)

28 U.S.C. § 2106. **Determination.**

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or other of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.